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7 KESHAWN FULTON MITCHELL,
8 Plaintiff,
9 v.
10 COUNTY OF CONTRA COSTA, et al.,
11 Defendants.

Case No. [21-cv-05014-DMR](#)

**ORDER GRANTING LEAVE TO FILE
SECOND AMENDED COMPLAINT**

Re: Dkt. No. 40

12 Plaintiff Keshawn Fulton Mitchell filed a complaint against Defendants County of Contra
13 Costa (“Contra Costa”) and law enforcement officers Thomas Brook and Kyle Emley alleging
14 claims arising out of his February 2020 arrest. Mitchell now moves pursuant to Federal Rule of
15 Civil Procedure 15(a) to file a second amended complaint that adds a claim for malicious
16 prosecution under 42 U.S.C. § 1983. [Docket No. 40.] This matter is suitable for resolution
17 without a hearing. Civ. L.R. 7-1(b). For the following reasons, the motion is granted.

18 **I. BACKGROUND AND PROCEDURAL HISTORY**

19 The operative first amended complaint contains the following allegations: Brook and
20 Emley are officers with the Contra Costa County Sheriff’s Office (“CCCSO”). [Docket No. 25
21 (First Am. Compl., “FAC”) ¶ 5.] On February 27, 2020, Mitchell “was a passenger in a vehicle
22 that had been pursued by law enforcement.” *Id.* at ¶ 12 n.1. When the car stopped, Mitchell
23 exited the vehicle and “very briefly, ran before stopping and surrendering to the Defendant
24 Deputies” in accordance with their orders. *Id.* (emphasis removed). After Mitchell surrendered,
25 he was “unnecessarily, repeatedly, and inappropriately struck by Brook and/or Emley.” *Id.* at ¶
26 12. The officers struck Mitchell with batons and stomped the back of his head while he was face-
27 down on the ground with his arms out. He suffered dental injuries and injury to his head. *Id.*

28 Mitchell alleges that the officers “materially and deliberately misrepresented their contact”

1 with him by claiming that he ignored their commands “to stop running and get on the ground”
2 after they identified themselves, resulting in a foot chase that ended when Mitchell tried and failed
3 to jump over a fence. *Id.* They also fabricated a report that Mitchell’s injuries were caused by an
4 alleged fall, face first, from the fence. Mitchell alleges that he “did not fall face first onto the
5 sidewalk, did not attempt to climb or jump over a wrought iron fence, [and] did not ignore
6 multiple commands from Defendants resulting in a foot chase spanning 200 yards or lasting
7 approximately 1 minute.” *Id.* He also alleges that he “did not, at any time, physically resist,
8 threaten, batter, or assault any Defendant,” fail to obey any order prior to the officers’ use of force,
9 or “delay, obstruct, or interfere” with the officers’ duties. *Id.* at ¶ 14.

10 Mitchell was arrested and charged with violating California Penal Code section 148(a)(1)¹
11 based on “deliberately fabricated facts.” *Id.* at ¶ 13. He alleges that his prosecution “was subject
12 to a Misdemeanor Pre-Trial Diversion Order . . . without a plea.” *Id.*

13 Mitchell filed the original complaint on June 29, 2021. Defendants subsequently moved
14 pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss certain claims in the complaint
15 and then in the FAC. The remaining claims are: 1) a 42 U.S.C. § 1983 claim for violations of the
16 Fourth Amendment based on excessive force, unlawful arrest, and fabrication of material facts
17 against Brook and Emley and Doe Defendants 1 to 100; and 2) a 42 U.S.C. § 1983 claim against
18 Contra Costa and Doe Defendants 101 to 200 for municipal liability under *Monell v. Department*
19 *of Social Services of City of New York*, 436 U.S. 658 (1978), based on policies, customs, or
20 practices. *See Mitchell v. Cnty. of Contra Costa*, No. 21-CV-05014-DMR, 2022 WL 1225015, at
21 *2, 10 (N.D. Cal. Apr. 26, 2022).

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23 ¹ The relevant provision of California Penal Code section 148 states:

24 Every person who willfully resists, delays, or obstructs any public
25 officer, peace officer, or an emergency medical technician . . . in the
26 discharge or attempt to discharge any duty of his or her office or
27 employment, when no other punishment is prescribed, shall be
punished by a fine not exceeding one thousand dollars (\$1,000), or by
imprisonment in a county jail not to exceed one year, or by both that
fine and imprisonment.

28 Cal. Penal Code § 148(a)(1).

1 The court held an initial case management conference on March 30, 2022 and set a May
2 31, 2022 deadline to seek leave to amend the pleadings to add new parties, claims, or defenses.
3 [Docket No. 30.]

4 On July 5, 2022, Mitchell filed the instant motion for leave to file a second amended
5 complaint (“SAC”) that adds a claim for malicious prosecution under section 1983 and additional
6 factual allegations to support that claim. [See Docket Nos. 40-1 (Lagos Decl., Jul. 5, 2022) Ex. A
7 (Prop. SAC) at ¶¶ 13, 20, 21; 43-1 (Lagos Decl., Jul. 21, 2022) ¶ 3, Ex. C (Ex. C to Prop. SAC).]²
8 He contends that amendment is warranted due to a recent change in the law regarding malicious
9 prosecution claims. Defendants oppose the motion.

10 **II. LEGAL STANDARD**

11 Under Federal Rule of Civil Procedure 15(a), leave to amend the pleadings before trial
12 should be given “freely . . . when justice so requires.” Fed. R. Civ. P. 15(a)(2). “This policy is to
13 be applied with extreme liberality,” *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051
14 (9th Cir. 2003) (quotation omitted), and the Ninth Circuit has instructed that “the court must
15 remain guided by the underlying purpose of Rule 15 . . . to facilitate decision on the merits, rather
16 than on the pleadings or technicalities.” *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000)
17 (quotation marks and citation omitted, alteration in original). Therefore, in the absence of an
18 “apparent” reason, such as undue delay, bad faith or dilatory motive, prejudice to the opposing
19 party, futility of the amendments, or repeated failure to cure deficiencies in the complaint by prior
20 amendment, it is an abuse of discretion for a district court to refuse to grant leave to amend a
21 complaint. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Lockheed Martin Corp. v. Network Sols., Inc.*, 194 F.3d 980, 986 (9th Cir. 1999). These factors do not “merit equal weight,” and “it is the
22 consideration of prejudice to the opposing party that carries the greatest weight.” *Eminence
23 Capital*, 316 F.3d at 1052. “Granting leave to amend does not necessarily mean that the
24 underlying allegations ultimately have merit.” *FlatWorld Interactives LLC v. Apple Inc.*, 12-CV-
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28 ² For the reasons supporting the ruling in this order, the court finds good cause to modify its May
31, 2022 deadline to allow Plaintiff to seek leave to file a second amended complaint. Fed. R.
Civ. P. 16(b)(4).

1 01956-WHO, 2013 WL 6406437, at *3 (N.D. Cal. Dec. 6, 2013). “Rather, ‘[a]bsent prejudice, or
2 a strong showing of any of the remaining [] factors, there exists a presumption under Rule 15(a)
3 in favor of granting leave to amend.’” *Id.* (quoting *Eminence Capital*, 316 F.3d at 1052).

4 III. DISCUSSION

5 Mitchell seeks leave to file the proposed SAC adding a claim for malicious prosecution
6 under section 1983 and additional factual allegations in support of that claim. Mitchell’s counsel
7 states that after filing the FAC, he learned of *Thompson v. Clark*, 142 S. Ct. 1332, 1341 (2022), in
8 which the United States Supreme Court held that “a Fourth Amendment claim under § 1983 for
9 malicious prosecution does not require the plaintiff to show that the criminal prosecution ended
10 with some affirmative indication of innocence. A plaintiff need only show that the criminal
11 prosecution ended without a conviction.” Prior to *Thompson*, which was issued on April 4, 2022,
12 an individual seeking to bring a malicious prosecution claim was required to show that the prior
13 proceedings “terminated in favor of the accused.” *See Lacey v. Maricopa Cnty.*, 693 F.3d 896,
14 919 (9th Cir. 2012); *accord Awabdy v. City of Adelanto*, 368 F.3d 1062, 1068 (9th Cir. 2004)
15 (“[a]n individual seeking to bring a malicious prosecution claim must generally establish that the
16 prior proceedings terminated in such a manner as to indicate his innocence.”).

17 Mitchell seeks leave to add factual allegations in support of a malicious prosecution claim,
18 including the following amended allegation about the termination of his criminal prosecution:

19 13. Plaintiff was arrested and criminally charged with a violation of
20 Penal Code § 148(a)(1) based upon the deliberately fabricated facts
21 which prosecution was subject to a Misdemeanor Pre-Trial Diversion
22 Order pursuant to Penal Code § 1001, et seq., Penal Code § 1001.50
without a plea following Plaintiff’s appearance in Court the failure
of which would subject Plaintiff to arrest pursuant to a Court-issued
warrant (see Exhibit C). Following Plaintiff’s successful completion
of the misdemeanor pre-trial diversion order, the criminal complaint
was dismissed on December 21, 2021. Plaintiff’s prosecution ended
without a conviction.

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24 Prop. SAC ¶ 13 (emphases in original; proposed amendment underlined). He also seeks leave to
25 add the allegations that Defendants violated Mitchell’s Fourth Amendment right “to be free from a
26 criminal prosecution lacking probable cause”; that the “criminal prosecution to which [he] was
27 subjected also denied Plaintiff his constitutional right to liberty”; and that “Defendants’ motive in
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1 causing the prosecution to be filed and maintained was malicious because . . . they sought to hide
2 and cover-up their unlawful conduct . . . which caused Plaintiff his physical injuries and which
3 injuries had to be reported and otherwise explained and justified to Defendants' employer." *Id.* at
4 ¶¶ 20-21.

5 Mitchell argues that the proposed SAC is timely and should be allowed because *Thompson*
6 "dramatically changed the law with respect to the legal requirements for a Fourth Amendment §
7 1983 constitutional claim of malicious prosecution." He also argues that the amendment is in
8 good faith, and that since it relies on existing allegations that "the deputies did not honestly report
9 their contact with Plaintiff" in order "to protect themselves from their abuse of power,"
10 Defendants will not be prejudiced by the amendment. Mot. 5.

11 Defendants oppose the motion. They do not argue that bad faith, undue delay, prejudice,
12 or previous amendment weigh against granting leave to amend. Instead, they argue that
13 amendment should be denied because the proposed malicious prosecution claim is futile.

14 "A proposed amendment is futile only if no set of facts can be proved under the
15 amendment to the pleadings that would constitute a valid and sufficient claim or defense." *Miller*
16 *v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988). "To state a malicious prosecution claim
17 under Section 1983, a plaintiff must show that the defendant (1) prosecuted plaintiff (2) with
18 malice; (3) without probable cause; and (4) with 'the purpose of denying plaintiff equal protection
19 or another constitutional right.'" *Heard v. Jackson*, No. 21-CV-09472-JSC, 2022 WL 2356821, at
20 *4 (N.D. Cal. June 30, 2022) (quoting *Lacey*, 693 F.3d at 919 (quoting *Freeman v. City of Santa*
21 *Ana*, 68 F.3d 1180, 1189 (9th Cir. 1995))). A plaintiff must also show that "the criminal
22 prosecution ended without a conviction." *Thompson*, 142 S. Ct. at 1341.

23 Where, as here, a malicious prosecution claim is based on the Fourth Amendment, the
24 plaintiff "must demonstrate a Fourth Amendment seizure . . ." See Prop. SAC ¶ 20; *Yousefian v.*
25 *City of Glendale*, 779 F.3d 1010, 1015 (9th Cir. 2015) (quotation marks and citations omitted).
26 Defendants sole argument on futility is that Mitchell has not stated a Fourth Amendment
27 malicious prosecution claim because the proposed SAC "does not allege facts showing that
28 Plaintiff was seized in connection with his allegedly unlawful prosecution." Opp'n 4. They note

1 that the proposed SAC “reflect[s] that he appeared in court without having to enter a plea, that he
2 could have been subject to arrest had he not appeared (but this did not happen), and that the
3 charges against him were eventually dismissed.” Opp’n 4. Defendants contend that “[n]one of
4 this amounts to a seizure.” *Id.* at 4-5 (citing *Karam v. City of Burbank*, 352 F.3d 1188, 1193 (9th
5 Cir. 2003) (holding that conditions of plaintiff’s pretrial release “requiring that she obtain
6 permission of the court before leaving the state and that she make court appearances” in
7 connection with misdemeanor charge did not amount to a seizure under the Fourth Amendment)).

8 Defendants’ argument ignores that the FAC and proposed SAC both allege that “**Plaintiff**
9 **was arrested** and criminally charged . . . based upon the deliberately fabricated facts.” FAC ¶ 13;
10 Prop. SAC ¶ 13 (emphasis added). It is well-settled “that a Fourth Amendment seizure occurs
11 when a person is held in custody by arresting officers.” *Karam*, 352 F.3d at 1193 (citing *Fontana*
12 *v. Haskin*, 262 F.3d 871, 879 (9th Cir. 2001)).

13 Defendants offer no other argument about the sufficiency of the proposed Fourth
14 Amendment malicious prosecution claim but assert that even if the proposed SAC states such a
15 claim, Brook and Emley are entitled to qualified immunity. Opp’n 5.

16 “[Q]ualified immunity protects government officials ‘from liability for civil damages
17 insofar as their conduct does not violate clearly established statutory or constitutional rights of
18 which a reasonable person would have known.’” *Moss v. U.S. Secret Serv.*, 675 F.3d 1213, 1222
19 (9th Cir. 2012) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)). The qualified immunity
20 analysis involves two inquiries. First, taken in the light most favorable to the plaintiff, the court
21 must ask whether the facts alleged show that the officer’s conduct violated a constitutional right.
22 *Saucier v. Katz*, 533 U.S. 194, 201 (2001). If the answer is “no,” then the court need not inquire
23 further before ruling that the officer is entitled to qualified immunity. *Id.* If, however, “a violation
24 could be made out on a favorable view of the parties’ submissions,” the court must examine
25 “whether the [constitutional] right was clearly established.” *Id.* The court may exercise its
26 discretion in deciding “which of the two prongs of the qualified immunity analysis should be
27 addressed first in light of the circumstances in the particular case at hand.” *Pearson v. Callahan*,
28 555 U.S. 223, 236 (2009).

1 “The linchpin of qualified immunity is the reasonableness of the official’s conduct.”
2 *Rosenbaum v. Washoe Cnty.*, 663 F.3d 1071, 1075 (9th Cir. 2011) (citation omitted). “The
3 relevant, dispositive inquiry in determining whether a right is clearly established is whether it
4 would be clear to a reasonable officer that his conduct was unlawful in the situation he
5 confronted.” *Saucier*, 533 U.S. at 202. “If the law did not put the officer on notice that his
6 conduct would be clearly unlawful, summary judgment based on qualified immunity is
7 appropriate.” *Id.* “A clearly established right is one that is ‘sufficiently clear that every
8 reasonable official would have understood that what he is doing violates that right.’” *Mullenix v.*
9 *Luna*, 577 U.S. 7, 11 (2015) (per curiam) (quoting *Reichle v. Howards*, 566 U.S. 658, 664 (2012)).
10 The Supreme Court has cautioned that specificity in determining whether “the violative nature of
11 *particular* conduct is clearly established . . . is especially important in the Fourth Amendment
12 context, where the Court has recognized that it is sometimes difficult for an officer to determine
13 how the relevant legal doctrine . . . will apply to the factual situation the officer confronts.”
14 *Mullenix*, 136 S. Ct. at 308 (emphasis in original; quotation omitted). A court determining
15 whether a right was clearly established looks to “Supreme Court and Ninth Circuit law existing at
16 the time of the alleged act.” *Community House, Inc. v. Bieter*, 623 F.3d 945, 967 (9th Cir. 2010)
17 (citing *Osolinski v. Kane*, 92 F.3d 934, 936 (9th Cir. 1996)). “[T]here can be the rare ‘obvious
18 case,’ where the unlawfulness of the officer’s conduct is sufficiently clear even though existing
19 precedent does not address similar circumstances.” *D.C. v. Wesby*, 138 S. Ct. 577, 590 (2018).

20 Defendants’ qualified immunity argument is as follows: prior to *Thompson*, a plaintiff
21 could not establish a malicious prosecution claim unless they could show that the prosecution
22 “terminated in favor of the accused.” *See Lacey*, 693 F.3d at 919. “Following *Thompson*, that is
23 no longer so.” Opp’n 5. According to Defendants, at the time of Mitchell’s February 2020 arrest,
24 “it was not clearly established that a law enforcement officer violates the Constitution by making
25 false statements in an incident report even though the subsequent criminal prosecution fails to
26 terminate in a manner indicating the suspect’s innocence. Instead, the *opposite* was clearly
27 established, that such allegations did *not* implicate the Constitution.” *Id.* (emphasis in original).
28 Defendant’s argument lacks merit. The issue for qualified immunity is whether “the unlawfulness

1 of [officers'] *conduct* was 'clearly established at the time.'" *Wesby*, 138 S. Ct. at 589 (quotation
2 marks and citation omitted) (emphasis added). As another court in this district recently held, "it is
3 obvious to any reasonable officer that they cannot cite a suspect based on knowingly false
4 information, from which a prosecutor would file charges." *Franklin v. Mally*, No. 17-cv-00789-
5 HSG, 2019 WL 2548687, at *7 (N.D. Cal. Jun. 20, 2019) (denying summary judgment on
6 malicious prosecution claim based on qualified immunity) (citing *Blankenhorn v. City of Orange*,
7 485 F.3d 463, 480-83 (9th Cir. 2007)); *cf. Santana v. Cnty. of Yuba*, No. 215CV00794KJMEFB,
8 2016 WL 8673061, at *13 (E.D. Cal. Aug. 19, 2016), *aff'd*, 856 F. App'x 65 (9th Cir. 2021)
9 (concluding that "no reasonable officer could conclude that the Constitution permits her to
10 manipulate evidence to support an unsupportable felony charge" and denying motion to dismiss
11 equal protection claim based on qualified immunity).³ Defendants offer no authority or argument
12 supporting their position that Brook and Emley were *not* on notice that they could not prosecute
13 Mitchell based on allegedly fabricated evidence.

14 Ultimately, "[t]he party opposing amendment bears the burden of showing why leave to
15 amend should not be granted," *Microsoft Corp. v. Hon Hai Precision Indus. Co.*, No. 19-CV-
16 01279-LHK, 2020 WL 836712, at *14 (N.D. Cal. Feb. 20, 2020) (citations omitted), and as noted,
17 "[a] proposed amendment is futile only if no set of facts can be proved under the amendment to
18 the pleadings that would constitute a valid and sufficient claim or defense." *Miller*, 845 F.2d at
19 214. The court concludes that Defendants have failed to establish that Mitchell's proposed
20 malicious prosecution claim is futile. Mitchell's motion is timely given the recent change in the
21 law regarding malicious prosecution claims, and Defendants are not prejudiced by the amendment
22 because it is based largely on facts that are already alleged in the operative complaint.
23 Accordingly, the court grants Mitchell's motion for leave to file the proposed SAC.

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³ Defendants also argue that Brook and Emley are entitled to qualified immunity on the proposed
malicious prosecution claim because "it was not clearly established at the time of the alleged
incident that a person is 'seized' under the Fourth Amendment just because he is ordered to appear
in court." Opp'n 6. As discussed above, the FAC and proposed SAC allege Mitchell "was
arrested" and thus seized within the meaning of the Fourth Amendment.

1 **IV. CONCLUSION**
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5 For the foregoing reasons, Mitchell's motion for leave to file the proposed SAC adding a
6 malicious prosecution claim is granted. Mitchell shall file the SAC by no later than September 6,
7 2022.
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10 **IT IS SO ORDERED.**
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13 Dated: August 30, 2022
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